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7 IN RE AQUA METALS, INC.
8 SECURITIES LITIGATION
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. [17-cv-07142-HSG](#)

**ORDER GRANTING MOTION FOR
FINAL APPROVAL AND MOTION
FOR ATTORNEYS' FEES AND COSTS**

Re: Dkt. Nos. 174, 175

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13 Pending before the Court are Plaintiffs' motions for final approval of class action
14 settlement and for attorneys' fees, costs, and incentive award. Dkt. Nos. 174, 175. The Court held
15 a final fairness hearing on February 24, 2022. For the reasons detailed below, the Court
16 **GRANTS** both motions.

17 **I. BACKGROUND**

18 **A. Factual Allegations and Procedural Background**

19 Plaintiffs brought this securities class action lawsuit against Defendants Aqua Metals, Inc.
20 ("Aqua Metals") and some of its officers and directors in December 2017. *See* Dkt. No. 1.
21 Plaintiffs allege that Defendants artificially inflated Aqua Metals's stock price by misleading
22 investors about the viability and profitability of its lead-acid battery recycling technology. *See*
23 Dkt. No. 119 ("Amended Consolidated Complaint" or "ACC"). Plaintiffs further allege that,
24 when the truth about the technology was revealed, Aqua Metals's stock price plummeted in a
25 series of one-day drops, which caused Plaintiffs to suffer significant damages. *See id.*

26 Based on these allegations, Plaintiffs seek to represent themselves and investors who
27 purchased or otherwise acquired common stock of Aqua Metals sold between May 19, 2016 and
28 November 9, 2017 (the "Class Period"). *See id.* They assert causes of action for violations of

1 Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a)
2 (the “Exchange Act”), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (“Rule 10b-5”). *See id.*

3 In March 2018, the Court consolidated three related class actions then pending in the
4 Northern District of California into one class action lawsuit entitled *In re Aqua Metals, Inc.*
5 *Securities Litigation*, No. 4:17-cv-07142. Dkt. No. 50. The Court appointed the Plymouth County
6 Group as Lead Plaintiff for the Class and approved Lead Plaintiff’s choice of the law firms of
7 Berman Tabacco and Levi & Korsinsky, LLP as Class Counsel. Dkt. No. 57. Lead Plaintiff then
8 filed a Consolidated Complaint for Violations of Securities Laws alleging claims under the
9 Exchange Act and the Securities Act of 1933 (“Securities Act”). Dkt. No. 83.

10 In September 2018, Defendants moved to dismiss the Consolidated Complaint. Dkt. No.
11 93. The Court granted in part and denied in part Defendants’ motion to dismiss, denying
12 Defendants’ motion to dismiss as to the Section 10(b), Rule 10b-5(a) and (c) Scheme Liability
13 Claim and Section 20(a) Control Person Liability Claim, while granting the motion as to the
14 Section 10(b), Rule 10b-5(b) Misrepresentation Claim, Section 11 Claim, and Section 15 Claim
15 with leave to amend. Dkt. No. 113.

16 In September 2019, Lead Plaintiff filed the Amended Consolidated Complaint, which is
17 the operative complaint in this case. Dkt. No. 119. The ACC asserts only Exchange Act claims
18 against Aqua Metals and the Individual Defendants. *Id.* Defendants moved to dismiss the ACC’s
19 Section 10(b), Rule 10b-5(b) Misrepresentation Claim and the Section 20(a) Control Person
20 Liability Claim as it relates to Count One of the ACC. *See* Dkt. Nos. 128-29. In November 2020,
21 the Court granted the motion and dismissed the Section 10(b), Rule 10b-5(a) and (c) scheme
22 liability claim and Section 20(a) control person liability claim as it relates to Count One of the
23 ACC. *See* Dkt. No. 141.

24 In July 2021, following formal discovery and with the assistance of a mediator, the parties
25 entered into a settlement agreement. Dkt. No. 166-1 (“SA”). Shortly afterwards, Plaintiffs filed a
26 motion for preliminary approval of a proposed settlement agreement. Dkt. No. 165. The Court
27 granted preliminary approval on October 5, 2021. Dkt. No. 170.

B. Settlement Agreement

The key terms of the Settlement Agreement are as follows:

Class Definition: The Settlement Class is defined as: “All persons and entities who purchased or otherwise acquired common stock or options to purchase common stock of Aqua Metals between May 19, 2016 and November 9, 2017, inclusive, and were damaged as a result.”

SA ¶ 1.35. The following persons are excluded from the Settlement Class:

- (a) Defendants;
- (b) members of the immediate family of each of the Defendants;
- (c) Defendants' subsidiaries and affiliates;
- (d) any person who is an officer, director or controlling person of Aqua;
- (e) any entity in which any Defendant has a controlling interest;
- (f) Defendants' directors' and officers' liability insurance carriers, and any of their affiliates or subsidiaries; and
- (g) the legal representatives, heirs, successors or assigns of any such excluded party.

Id. All persons who submit valid and timely requests for exclusions from the Class will also be excluded. *Id.*

Settlement Benefits: Aqua Metals will make a \$7 million non-reversionary payment into a Settlement Fund. *Id.* ¶ 4.1. The \$7 million payment will consist of \$6.5 million in cash to be funded by Aqua Metals’s D&O insurance carriers and \$500,000 in either Aqua Metals common stock or cash, at Aqua Metals’s sole option. *Id.* After deduction of taxes, administration costs, litigation expenses, attorneys’ fees, and any incentive award to Lead Plaintiff for its costs and expenses, the rest (the “Net Settlement Fund”) will be distributed to the Settlement Class Members under the Plan of Allocation. *Id.* ¶ 5.2.

According to the Plan of Allocation, a third-party settlement administrator will determine each authorized claimant's share of the Net Settlement Fund based upon the recognized loss formula ("Recognized Loss"). *See id.*, Ex. A-1 at 14. A Recognized Loss will be calculated for each share of Aqua Metals common stock and each exchange traded call option on Aqua Metals common stock purchased or otherwise acquired during the Settlement Period. *See id.*, Ex. A-1 at 14-15. Each authorized claimant's Recognized Loss calculation depends on several factors, including when they purchased or otherwise acquired Aqua Metals securities during the

1 Settlement Class Period and in what amounts, and whether such securities were sold and, if sold,
2 when and for what amounts. *See id.*, Ex. A-1 at 15-19. Depending on the number of eligible
3 shares purchased by investors who elect to participate in the settlement and when those shares
4 were purchased and sold, the average distribution is estimated to be \$0.49 per damaged share
5 purchased in the Settlement Class Period, before deduction of Court-approved fees and expenses.
6 *See id.*, Ex. A-1 at 1.

7 Cy Pres Distribution: If any portion of the Net Settlement Fund remains following
8 distribution under the Plan of Allocation and is of an amount that, in the discretion of Class
9 Counsel, is not cost effective or efficient to redistribute to the Settlement Class, then those
10 remaining funds, after payment of any further notice and administration costs and taxes, will be
11 donated to Loyola University School of Law's Institute for Investor Protection. SA ¶ 4.4; Dkt.
12 No. 176, Declaration of Kristin J. Moody in Support of Motion for Settlement ("Moody Decl.") ¶
13 89.

14 Release: Under the Settlement Agreement, all class members will release their "Released
15 Claims" against the "Defendant Releasees." SA ¶ 3.2. "Plaintiffs' Released Claims" are defined
16 as follows:

17 [A]ny and all claims, demands, losses, rights, and causes of action, of
18 any nature whatsoever, whether known or unknown, that have been
19 or could have been asserted in this Action or could in the future be
20 asserted in any forum, whether foreign or domestic, whether arising
21 under federal, state, common, or foreign law, by Lead Plaintiff, any
22 member of the Settlement Class, or their successors, assigns,
23 executors, administrators, representatives, attorneys, and agents, in
24 their capacities as such, whether brought directly or indirectly against
25 any of the Defendants, which (a) arise out of, are based upon, or relate
26 to in any way any of the allegations, acts, transactions, facts, events,
27 matters, occurrences, representations or omissions involved, set forth,
28 alleged or referred to, in this Action, or which could have been alleged
in this action, and (b) arise out of, are based upon, or relate to in any
way to the purchase, acquisition, holding, sale, or disposition of any
Aqua securities during the Class Period. The Settlement shall include
a waiver of Lead Plaintiff's and Settlement Class Members' rights
under California Civil Code §1542 or similar laws. Notwithstanding
the foregoing, "Plaintiffs' Released Claims" do not include: (i) claims
relating to the enforcement of the Settlement; or (ii) claims asserted
on behalf of Aqua in any derivative action based on similar
allegations, including but not limited to claims in *In re Aqua, Inc.*
Stockholder Derivative Litigation, Master File No. 1:18-cv-00201 (D.

Del. 2018).

Id. ¶ 1.29. The “Defendant Releasees,” in turn, are Defendants and all their present and former parents, subsidiaries, divisions, affiliates, present and former employees, officers and directors, present and former attorneys, accountants, insurers, and agents, and predecessors, heirs, successors, and assigns. *Id.* ¶ 1.10.

Class Notice: The parties agreed that A.B. Data, a third-party settlement administrator (or “Claims Administrator”) would mail notice of the class action settlement and a claim form to all class members who could be identified with reasonable effort. *Id.* ¶ 8.2.

Settlement Class Members had until January 3, 2022, to opt out of the Settlement Class by submitting a valid and timely request to the Claims Administrator in the manner described in the Notice. SA ¶ 9.1-9.2. Any member of the Settlement Class who did not submit a timely written request for exclusion will be bound by the terms of the Settlement Agreement or any final judgment. *Id.* ¶ 9.2. Conversely, all persons who did submit valid and timely requests for exclusion have no rights under the Settlement Agreement, will not share in the distribution of the Net Settlement Fund, and will not be bound by the Settlement Agreement or any final judgment.

Incentive Award: The Settlement Agreement allows Class Counsel to seek an award to pay the costs and expenses of Lead Plaintiff in connection with the prosecution of this case. *Id.* ¶ 7.1. Class Counsel's declaration states that Lead Plaintiff intends to seek an award not to exceed \$5,000 in total for its costs and expenses related to this litigation. *See* Moody Decl. ¶ 21.

Attorneys' Fees and Costs: The Settlement Agreement allows Class Counsel to seek an attorneys' fees award and for reimbursement of litigation expenses. SA ¶ 7.1. Class Counsel is moving for attorneys' fees in the amount of \$1,750,000. *See* Moody Decl. ¶ 19. They are also requesting reimbursement of litigation expenses in the amount of \$95,634.04. *Id.* ¶ 20.

C. Supplemental Agreement

The Settlement Agreement also references a confidential “Supplemental Agreement” that was not filed with the Court. *See* S.A. ¶ 12.2. The Supplemental Agreement details the conditions under which Defendants may terminate the settlement if the requests for exclusion from the

1 settlement class exceed a certain level. *Id.* At the Court’s request, the parties submitted the
2 confidential Supplemental Agreement for *in camera* review. The Court reviewed the
3 Supplemental Agreement and found that it does not impact the fundamental fairness of the
4 Settlement Agreement. *See* Dkt. No. 170 at 6.

5 **II. ANALYSIS**

6 **A. Final Settlement Approval**

7 **i. Class Certification**

8 Final approval of a class action settlement requires, as a threshold matter, an assessment of
9 whether the class satisfies the requirements of Federal Rule of Civil Procedure 23(a) and
10 (b). *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019–1022 (9th Cir. 1998). Because no facts that
11 would affect these requirements have changed since the Court preliminarily approved the class on
12 October 5, 2021, this order incorporates by reference the Court’s prior analysis. *See* Dkt. No. 170
13 at 8-11.

14 **ii. The Settlement**

15 Federal Rule of Civil Procedure 23(e) provides that “[t]he claims, issues, or defenses of a
16 certified class—or a class proposed to be certified for purposes of settlement—may be settled . . .
17 only with the court’s approval.” Fed. R. Civ. P. 23(e). “The purpose of Rule 23(e) is to protect
18 the unnamed members of the class from unjust or unfair settlements affecting their rights.” *In re*
19 *Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). Accordingly, before a district court
20 approves a class action settlement, it must conclude that the settlement is “fundamentally fair,
21 adequate and reasonable.” *In re Heritage Bond Litig.*, 546 F.3d 667, 674–75 (9th Cir. 2008).

22 Where the parties reach a class action settlement prior to class certification, district courts
23 apply “‘a higher standard of fairness’ and ‘a more probing inquiry than may normally be required
24 under Rule 23(e).’” *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (citation omitted).
25 Such settlement agreements “must withstand an even higher level of scrutiny for evidence of
26 collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing
27 the court’s approval as fair.” *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048–49 (9th Cir.
28 2019) (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)). A

1 more ““exacting review’ is warranted ‘to ensure that class representatives and their counsel do not
2 secure a disproportionate benefit at the expense of the unnamed plaintiffs who class counsel had a
3 duty to represent.”” *Id.* (citations and quotations omitted).

4 To assess whether a proposed settlement comports with Rule 23(e), the Court “may
5 consider some or all” of the following factors: (1) the strength of plaintiff’s case; (2) the risk,
6 expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class
7 action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery
8 completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the
9 presence of a governmental participant; and (8) the reaction of the class members to the proposed
10 settlement. *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 963 (9th Cir. 2009); *see also Hanlon*,
11 150 F.3d at 1026. The relative degree of importance of any particular factor is case specific.
12 *Officers for Justice*, 688 F.2d at 625.

13 In addition, adequate notice is “critical” to court approval of a class settlement under Rule
14 23(e). *Hanlon*, 150 F.3d at 1025. As discussed below, the Court finds that the proposed
15 settlement is fair, adequate, and reasonable, and that class members received adequate notice.

16 a. Adequacy of Notice

17 Under Federal Rule of Civil Procedure 23(e), the Court “must direct notice in a reasonable
18 manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1).
19 Rule 23(c)(2)(B) requires “the best notice that is practicable under the circumstances, including
20 individual notice to all members who can be identified through reasonable effort.” The notice
21 must “clearly and concisely state in plain, easily understood language” the nature of the action, the
22 class definition, and the class members’ right to exclude themselves from the class. Fed. R. Civ.
23 P. 23(c)(2)(B). Although Rule 23 requires that reasonable efforts be made to reach all class
24 members, it does not require that each class member actually receive notice. *See Silber v. Mabon*,
25 18 F.3d 1449, 1454 (9th Cir. 1994) (noting that the standard for class notice is “best practicable”
26 notice, not “actually received” notice).

27 The Court finds that the notice plan previously approved by the Court was well-
28 implemented and complies with Rule 23(c)(2)(B). *See* Dkt. No. 170 at 18–20. As of February 23,

1 2022, A.B. Data has mailed a total of 21,670 Notice Packets to potential Settlement Class
2 Members. *See* Dkt. No. 181, Second Supplemental Declaration of Adam D. Walter (“Second
3 Suppl. Walter Decl.”) ¶ 8. 126 of those packets were undeliverable and remailed. *See* Dkt. No.
4 177-2, Supplemental Declaration of Adam D. Walter (“Suppl. Walter Decl.”) ¶ 8. A.B. Data also
5 posted the requisite documents to the settlement website and published the Summary Notice in
6 *Investor’s Business Daily* and *PR Newswire*. *Id.* ¶¶ 5-9. A.B. Data maintained a toll-free
7 telephone number for the Settlement and has received and responded to 128 telephone calls as of
8 February 23, 2022. Second Suppl. Walter Decl. ¶ 7. And, also as of February 23, 2022, A.B. Data
9 has received no objections to the settlement and one request for exclusion from the Settlement
10 Class. *Id.* ¶¶ 10-11. In light of these facts, the Court finds that the parties have sufficiently
11 provided the best practicable notice to the class members.

12 **b. Fairness, Adequacy, and Reasonableness**

13 Having found the notice procedures adequate under Rule 23(e), the Court next considers
14 whether the entire settlement comports with Rule 23(e).

15 **1. Strength of Plaintiffs’ Case and Litigation Risk**

16 Approval of a class settlement is appropriate when plaintiffs must overcome significant
17 barriers to make their case. *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D.
18 Cal. 2010). Courts “may presume that through negotiation, the Parties, counsel, and mediator
19 arrived at a reasonable range of settlement by considering Plaintiff’s likelihood of recovery.”
20 *Garner v. State Farm Mut. Auto. Ins. Co.*, No. 08-cv-1365-CW, 2010 WL 1687832, at *9 (N.D.
21 Cal. Apr. 22, 2010). Additionally, difficulties and risks in litigating weigh in favor of approving a
22 class settlement. *Rodriguez*, 563 F.3d at 966. “Generally, unless the settlement is clearly
23 inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with
24 uncertain results.” *Ching v. Siemens Indus., Inc.*, No. 11-cv-04838-MEJ, 2014 WL 2926210, at *4
25 (N.D. Cal. June 27, 2014) (quotations omitted).

26 The Court finds that the amount offered in settlement is reasonable in light of the
27 complexity of this litigation and the risk Plaintiffs would face by continuing to litigate the case.
28 For example, Class Counsel notes that Defendants dispute the extent to which Aqua Metals’s

1 stock price decline was attributable to the alleged fraud, as opposed to other company-specific bad
2 news. *See* Moody Decl. ¶¶ 58, 60. Class Counsel also explains that Defendants' position as to
3 when the class period should begin could "severely limit" the amount of damages Plaintiffs would
4 be able to recover, if the Court were to agree. *See id.* ¶ 13. Moreover, Plaintiffs claim that
5 Defendants would "strenuously" dispute whether class certification is appropriate and also contest
6 each element of the causes of action, including deceptive or manipulative act, scienter, and loss
7 causation. *See id.* And even if Plaintiffs were to prevail, their recovery—after class certification,
8 trial, and appeals—could come years in the future. *See id.* ¶ 62. The Court finds that these factors
9 weigh in favor of approving the settlement. *See Ching*, 2014 WL 2926210, at *4 (favoring
10 settlement to protracted litigation).

2. Risk of Maintaining Class Action Status

12 In considering this factor, the Court looks to the risk of maintaining class certification if
13 the litigation were to proceed. Because the parties provisionally certified the class for the
14 purposes of settlement, Plaintiffs avoided the risks inherent in certifying and then maintaining
15 class status throughout the litigation. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160
16 (1982) (class certification orders are “inherently tentative”); *Rodriguez*, 563 F.3d at 966 (“A
17 district court may decertify a class at any time.”); *Omnivision Techs.*, 559 F. Supp. 2d at 1041
18 (“[T]here is no guarantee the certification would survive through trial[.]”). As Plaintiffs note,
19 those risks include the possibility that the class period would be shortened, that Defendants
20 would appeal a class certification order, or that the law could trend unfavorably. *See Moody*
21 Decl. ¶ 63. Considering those risks, the Court finds that this factor weighs slightly in favor of
22 approval.

3. Settlement Amount

24 The amount offered in the settlement is another factor that weighs in favor of approval. To
25 evaluate whether the settlement amount is adequate, “courts primarily consider plaintiffs’ expected
26 recovery balanced against the value of the settlement offer.” *In re Lenovo Adware Litig.*, No. 15-
27 MD-02624-HSG, 2018 WL 6099948, at *8 (N.D. Cal. Nov. 21, 2018).

28 Here, the total value of the settlement offer is \$7 million, consisting of \$6.5 million in cash

1 to be funded by Aqua Metals's D&O insurance carriers and \$500,000 in either Aqua Metals
2 common stock or cash, at Aqua Metals's sole option. SA ¶ 4.1. Class Counsel contends that this
3 settlement offer constitutes 7.3% of the most likely recoverable damages, assuming Plaintiffs were
4 to prevail on all claims against the Defendants. *See* Moody Decl. ¶ 13. The Court agrees that this
5 recovery is in line with comparable class action settlements. *See, e.g., Azar v. Blount Int'l, Inc.*,
6 No. 3:16-cv-0483, 2019 WL 7372658, at *7 (D. Or. Dec. 31, 2019) (approving settlement fund
7 amount of 4.63 to 7.65% of the class's total estimated damages); *In re Volkswagen "Clean*
8 *Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 2019 WL 2077847, at *2 n.2. (N.D. Cal. May
9 10, 2019) (noting that "the median settlement recovery from 2009 to 2017 was only five percent of
10 damages in securities class actions"). Moreover, "[i]t is well-settled law that a cash settlement
11 amounting to only a fraction of the potential recovery does not per se render the settlement
12 inadequate or unfair." *Officers for Justice v. Civil Serv. Comm'n of City & County of S.F.*, 688
13 F.2d 615, 628 (9th Cir. 1982).

14 **4. Extent of Discovery Completed and Stage of Proceedings**

15 The Court also finds that Class Counsel had sufficient information to make an informed
16 decision about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459
17 (9th Cir. 2000). The parties reached settlement after over three years of litigation and hard-fought
18 negotiations which consisted of careful analysis of complex factual and legal issues and an
19 extensive amount of time and effort. *See* Moody Decl. ¶ 8. The Court is persuaded that Class
20 Counsel entered the settlement discussions with a substantial understanding of the factual and
21 legal issues, so as to allow them to assess the likelihood of success on the merits. This factor
22 weighs in favor of approval.

23 **5. The Experience and Views of Counsel**

24 The Court next considers the experience and views of counsel. "[P]arties represented by
25 competent counsel are better positioned than courts to produce a settlement that fairly reflects each
26 party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967 (quotations omitted). Class
27 Counsel each have decades of experience litigating securities class actions. *See* Moody Decl. ¶
28 106. And Class Counsel recommend this Settlement as fair, adequate, and reasonable. *Id.* ¶ 22.

1 The Court recognizes, however, that courts have diverged on the weight to assign counsel's
2 opinions. *Compare Carter v. Anderson Merch.*, LP, 2010 WL 1946784, at *8 (C.D. Cal. May 11,
3 2010) ("Counsel's opinion is accorded considerable weight."), *with Chun-Hoon*, 716 F. Supp. 2d
4 at 852 ("[T]his court is reluctant to put much stock in counsel's pronouncements[.]"). This
5 factor's impact is therefore modest, but favors approval.

6. Reaction of Class Members

7 Finally, the reaction of the Class Members also supports final approval. "[T]he absence of
8 a large number of objections to a proposed class action settlement raises a strong presumption that
9 the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural*
10 *Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528–29 (C.D. Cal. 2004); *In re LinkedIn*
11 *User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015) ("A low number of opt-outs and
12 objections in comparison to class size is typically a factor that supports settlement approval.").

13 As of February 23, 2022, A.B. has received only one timely request for exclusion from the
14 settlement class. Second Suppl. Walter Decl. ¶ 9. No objections to the settlement have been
15 received. *Id.* ¶ 10. The Court finds that the minimal number of objections and opt-outs in
16 comparison to the size of the class indicates support among the Class Members and weighs in
17 favor of approval of the settlement. *See, e.g., Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566,
18 577 (9th Cir. 2004) (affirming settlement where 45 of approximately 90,000 class members
19 objected); *Rodriguez v. West Publ. Corp.*, Case No. CV05–3222 R, 2007 WL 2827379, at *10
20 (C.D. Cal. Sept. 10, 2007) (finding favorable class reaction where 54 of 376,301 class members
21 objected).

22 * * *

23 After considering and weighing the above factors, the Court finds that the settlement
24 agreement is fair, adequate, and reasonable, and that the settlement Class Members received
25 adequate notice.¹ Accordingly, Plaintiffs' motion for final approval of the class action settlement

26
27 ¹ The Court's Order preliminarily approving the Settlement Agreement scrutinized it for "evidence
28 of collusion or other conflicts of interest" and found none. *See* Dkt. No. 170 at 13–15; *see also*
Roes, 944 F.3d at 1049. Because no facts that would affect the Court's analysis have changed
since then, this Order incorporates its prior analysis by reference.

1 is **GRANTED**.

2 **B. Attorneys' Fees, Costs and Expenses, and Incentive Award**

3 Class Counsel also asks the Court to approve: (1) an award of attorneys' fees in the amount
4 of \$1,750,000 to Class Counsel; (2) reimbursement of \$95,634.04 in litigation expenses advanced
5 by Class Counsel; (3) payment of the Class Representative Incentive Awards in the amount of
6 \$5,000 to Lead Plaintiff. *See* Dkt. No. 175 ("Fees Mot.").

7 **i. Attorneys' Fees**

8 **a. Legal Standard**

9 Class counsel is entitled to an award of reasonable attorneys' fees and reimbursement of
10 litigation expenses from the common fund they created for the benefit of a class. *See* Fed. R. Civ.
11 P. 23(h); *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003). The purpose of the "common
12 fund" doctrine is to avoid unjust enrichment by requiring "those who benefit from the creation of
13 the fund [to] share the wealth with the lawyers whose skill and effort helped create it." *In re*
14 *Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). The district court
15 has discretion over the amount of attorney fees to award. *Vizcaino v. Microsoft Corp.*, 290 F.3d
16 1043, 1048 (9th Cir. 2002).

17 In a common fund case, the Court may choose either (1) the lodestar method or (2) the
18 percentage-of-the-fund to calculate reasonable attorneys' fees. *Id.* at 1047. Under the percentage-
19 of-recovery method, twenty-five percent of a common fund is the benchmark for attorneys' fees
20 awards. *See, e.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)
21 ("[C]ourts typically calculate 25% of the fund as the 'benchmark' for a reasonable fee award,
22 providing adequate explanation in the record of any 'special circumstances' justifying a
23 departure."); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).
24 Whether the Court awards the benchmark amount or some other rate, the award must be supported
25 "by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at
26 1048.

27 Under the lodestar method, a "lodestar figure is calculated by multiplying the number of
28 hours the prevailing party reasonably expended on the litigation (as supported by adequate

1 documentation) by a reasonable hourly rate for the region and for the experience of the lawyer.”
2 *In re Bluetooth*, 654 F.3d at 941 (citations omitted). “[T]he established standard when
3 determining a reasonable hourly rate is the rate prevailing in the community for similar work
4 performed by attorneys of comparable skill, experience, and reputation.” *Camacho v. Bridgeport*
5 *Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008) (quotations omitted). Generally, “the relevant
6 community is the forum in which the district court sits.” *Id.* (citations omitted). And typically,
7 “affidavits of the plaintiffs’ attorney and other attorneys regarding prevailing fees in the
8 community, and rate determinations in other cases . . . are satisfactory evidence of the prevailing
9 market rate.” *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir.
10 1990). “In addition to affidavits from the fee applicant, other evidence of prevailing market rates
11 may include affidavits from other area attorneys or examples of rates awarded to counsel in
12 previous cases.” *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 687 (N.D. Cal.
13 2016).

14 Although the choice between lodestar and percentage calculation depends on the
15 circumstances, either method may have its place in determining reasonable compensation for
16 creating a common fund. *Six Mexican Workers*, 904 F.2d at 1311.

17 **b. Analysis**

18 Class Counsel asks the Court to approve an award of attorneys’ fees in the amount of
19 \$1,750,000. *See* Fees Mot. at 9. The Court finds that this amount is reasonable.

20 First, in seeking 25% of the amount Defendants will pay to the settlement fund, Class
21 Counsel requests the “benchmark” reasonable award in this Circuit. *See, e.g., In re Bluetooth*
22 *Headset Prods. Liab. Litig.*, 654 F.3d at 942 (“[C]ourts typically calculate 25% of the fund as the
23 ‘benchmark’ for a reasonable fee award, providing adequate explanation in the record of any
24 ‘special circumstances’ justifying a departure.”). Second, and most significantly, Class Counsel
25 achieved significant results for the class members by obtaining a Net Settlement Amount of \$7
26 million. *See* Fees Mot. at 13. Third, no Class Member objected to the Settlement and only one
27 opted out, which suggests support for the settlement’s outcome. *See* Suppl. Walter Decl. ¶ 9. And
28 finally, Class Counsel assumed substantial risk in litigating this lengthy case on a contingency fee

1 basis and incurring costs without the guarantee of payment for its efforts. *See* Fees Mot. at 19.

2 Using the lodestar method to cross-check, the Court notes that Class Counsel's hourly rates
3 are \$765-\$1,050 for partners and \$425-\$650 for associates. *Id.* at 24. The Court finds that the
4 billing rates used by Class Counsel to calculate the lodestar are in line with prevailing rates in this
5 district for personnel of comparable experience, skill, and reputation. *See, e.g., Hefler v. Wells*
6 *Fargo & Co.*, No. 16-CV-05479, 2018 WL 6619983, at *14 (N.D. Cal. Dec. 18, 2018) (rates from
7 \$650 to \$1,250 for partners or senior counsel, \$400 to \$650 for associates); *In re Volkswagen*
8 *"Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 2672 CRB (JSC), 2017 WL
9 1047834, at *5 (N.D. Cal. Mar. 17, 2017) (finding billing rates ranging from \$275 to \$1600 for
10 partners, \$150 to \$790 for associates, and \$80 to \$490 for paralegals reasonable). Since Class
11 Counsel spent 5,966.75 hours on this litigation through preliminary approval, the aggregate
12 lodestar is approximately \$4,354,590.75. Fees Mot. at 19; Moody Decl. ¶ 101.

13 Class Counsel's fee request of \$1,750,000, then, amounts to a negative multiplier of 0.4 of
14 their anticipated lodestar. This is a reasonable request. *See, e.g., In re Regulus Therapeutics Inc.*
15 *Sec. Litig.*, No. 3:17-cv-182-BTM-RBB, 2020 WL 6381898, at *7 (S.D. Cal. Oct. 30, 2020) ("[A]
16 multiplier less than 1.0 is below the range typically awarded by courts[.]"). In recognition of the
17 favorable settlement, the substantial risks of litigation, and the financial burden assumed, the
18 Court **GRANTS** attorneys' fees of \$1,750,000.

19 **ii. Cost and Expenses**

20 An attorney who has created a common fund for the benefit of the class is entitled to
21 reimbursement of reasonable litigation costs from that fund. *See Harris v. Marhoefer*, 24 F.3d 16,
22 19 (9th Cir. 1994) (quotations omitted). Class Counsel is accordingly entitled to recover "those
23 out-of-pocket expenses that would normally be charged to a fee paying client." *Id.*

24 The Court finds that Class Counsel's request for reimbursement of \$95,634.04 in litigation
25 costs is reasonable. *See* Fees Mot. at 10. The incurred costs include damages consultant fees,
26 mediation fees, filing fees, process of service fees, electronic research, postage and travel. *See*
27 Moody Decl. ¶¶ 124-132. These reflect the type of expenses routinely charged to paying clients.
28 *See, e.g., Torres v. Pick-A-Part Auto Wrecking*, No. 116-CV-01915, 2018 WL 3570238, at *9

1 (E.D. Cal. July 23, 2018) (finding that ordinary out-of-pocket expenses include “(1) meals, hotels,
2 and transportation; (2) photocopies; (3) postage, telephone, and fax; (4) filing fees; (5) messenger
3 and overnight delivery; (6) online legal research; (7) class action notices; (8) experts, consultants,
4 and investigators; and (9) mediation fees”); *In re Immune Response Secs. Litig.*, 497 F. Supp. 2d
5 1166, 1177 (S.D. Cal. 2007) (same). And the amount requested is also within range of approval.
6 *See, e.g., Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1024 (E.D. Cal. 2019) (reimbursing
7 \$823,904.04 for costs including filing fees, copying, postage, document storage, depositions,
8 travel, experts, transcripts, computer research, the cost of the mediator, and common-fund
9 contributions). The Court finds that these costs were reasonably incurred and **GRANTS** the
10 motion for costs in the amount of \$95,634.04.

11 **iii. Class Representative Service Award**

12 Class Counsel seeks an incentive award of \$5,000 for Plaintiff Plymouth County Group,
13 which is the court-appointed Lead Plaintiff in this class action. *See* Fees Mot. at 10. Class
14 representatives are eligible for “reasonable incentive payments.” *Staton*, 327 F.3d at 977;
15 *Rodriguez*, 563 F.3d at 958 (“Incentive awards are fairly typical in class action cases.”). These
16 payments are designed to “compensate class representatives for work done on behalf of the class,
17 to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to
18 recognize their willingness to act as a private attorney general.” *Rodriguez*, 563 F.3d at 958–59.
19 Nevertheless, the Ninth Circuit has cautioned that “district courts must be vigilant in scrutinizing
20 all incentive awards to determine whether they destroy the adequacy of the class
21 representatives[.]” *Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013)
22 (quotations omitted). This is particularly true where “the proposed service fees greatly exceed the
23 payments to absent class members.” *Id.*

24 The district court must evaluate an incentive award using “relevant factors includ[ing] the
25 actions the plaintiff has taken to protect the interests of the class, the degree to which the class has
26 benefitted from those actions, . . . [and] the amount of time and effort the plaintiff expended in
27 pursuing the litigation[.]” *Id.* at 977. In the Ninth Circuit, courts often approve a \$5,000 service
28 award. *See Noroma v. Home Point Fin. Corp.*, No. 17-CV-07205-HSG, 2019 WL 1589980, at *8

1 (N.D. Cal. Apr. 12, 2019); *see also Harris v. Vector Marketing Corp.*, 2012 WL 381202, at *7
2 (N.D. Cal. 2012) (“Several courts in this District have indicated that incentive payments of
3 \$25,000 are quite high and/or that, as a general matter, \$5,000 is a reasonable amount.”).

4 The Court finds that the requested service awards are reasonable to compensate Lead
5 Plaintiff for its efforts for the following reasons. First, Lead Plaintiff has taken actions and spent
6 time to protect the interests of the class. As set forth in the Declarations of Plymouth County
7 Retirement Association and Declaration of Denis Taillefer and 1103371 Ontario Ltd.
8 accompanying this motion, Lead Plaintiff estimates that it spent over 120 hours in work directly
9 related to the representation of the Class. *See* Fees Mot. at 20; Moody Decl., Exs. 2, 3. This work
10 included assisting in investigating and substantiating the alleged claims, preparing court filings
11 and editing litigation documents, and attending mediation and settlement negotiations. *See* Fees
12 Mot. at 20. Second, as previously explained, their efforts led to favorable results for the entire
13 class. After reviewing Lead Plaintiff’s declaration, and considering the circumstances of this
14 lengthy case, the Court finds that the requested service award is reasonable to compensate Lead
15 Plaintiff for its efforts.

16 III. CONCLUSION

17 Accordingly, the Court **GRANTS** the motion for final approval of class action settlement
18 and **GRANTS** the motion for attorneys’ fees, costs, and incentive awards. The Court approves the
19 settlement amount of \$7,000,000. The Court also approves (1) Class Counsel’s request for an
20 award of attorneys’ fees in the amount of \$1,750,000; (2) Class Counsel’s request for payment of
21 current actual costs incurred in the amount of \$ 95,634.04; (3) the Class Representative Incentive
22 Awards in the amount of \$5,000 for Lead Plaintiff.

23 The parties and settlement administrator are directed to implement this Final Order and the
24 settlement agreement in accordance with the terms of the settlement agreement. The parties are
25 further directed to file a short stipulated final judgment of two pages or less within 14 days from
26 the date of this order. The judgment need not, and should not, repeat the analysis in this Order.

27 Within 21 days after the distribution of the settlement funds, the parties must file a Post-
28 Distribution Accounting, which provides the following information:

1 The total settlement fund, the total number of class members, the total
2 number of class members to whom notice was sent and not returned
3 as undeliverable, the number and percentage of claim forms
4 submitted, the number and percentage of opt-outs, the number and
5 percentage of objections, the average and median recovery per
6 claimant, the largest and smallest amounts paid to class members, the
7 method(s) of notice and the method(s) of payment to class members,
8 the number and value of checks not cashed, the amounts distributed
9 to each cy pres recipient, the administrative costs, the attorneys' fees
10 and costs, the attorneys' fees in terms of percentage of the settlement
11 fund, and the multiplier, if any.

12 Counsel are directed to summarize this information in an easy-to-read chart that allows for quick
13 comparisons with other cases. The parties shall post the Post-Distribution Accounting, including
14 the easy-to-read chart, on the settlement website. The Court may hold a hearing following
15 submission of the parties' Post-Distribution Accounting.

16 **IT IS SO ORDERED.**

17 Dated: 3/2/2022

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22 HAYWOOD S. GILLIAM, JR.
23 United States District Judge